HEADS OF PROSECUTING AGENCIES CONFERENCE

BELFAST & DUBLIN
4-9 September 2005

A Case Study on

MANAGEMENT OF THE MEDIA IN THE CRIMINAL JUSTICE SYSTEM

This paper was written both for the Criminal Lawyers Association of the Northern Territory Conference in Bali in early July 2005 and for HOPAC. As it was necessary to *pull some punches* (because of the postponement of the trial to later this year) the document is not as controversial as it might have been. Some additional issues will be discussed in confidential session.

I acknowledge that the paper was written in conjunction with junior counsel in the trial, Anne Barnett: I thank her for her very significant contribution.

Herding Cats!

MANAGEMENT OF THE MEDIA IN THE CRIMINAL JUSTICE SYSTEM

Introduction

The subject of this paper was selected earlier in the year. It was then anticipated that the trial of Bradley John Murdoch for offences alleged to have occurred at Barrow Creek in the Northern Territory of Australia on 14 July 2001 would have been completed by the time of publication. Such has not been the case. The trial is postponed for hearing now on 17 October 2005. In these circumstances it is no longer appropriate to deal, in a semi-public way, with the myriad legal and factual issues that have arisen in that case over the last four years. (The paper originally being intended to traverse some of the facts in issue and the means taken to ensure a fair trial for the accused).

However, there are some issues which have emerged since the extradition of Mr Murdoch to the Northern Territory in November 2003 which can be explored.

The Principles of Open Justice and of a Fair Trial

The Australian Courts have maintained an uneasy balance between these two equally important tenets of the system of the administration of criminal justice. The New South Wales Chief Justice Spigelman dealt with these issues in the *John Fairfax* case last year.[1] He demonstrated the fundamental nature of both principles in Australian (and English) law.

> *There is no aspect of preparation for trial or of criminal procedure which is not touched by, or indeed determined by, the principle of a fair trial. As Lord Devlin once put it:*
>
> > *Nearly the whole of the English criminal law of procedure and evidence has been made by the exercise of the judges of their powers to see that what was fair and just was done between prosecutors and accusers.*
> >
> > *Connelly v Director of Public Prosecutions [1964] AC 1254 @ 1347.*[2]

On the other hand, His Honour pointed out:

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[1] ***John Fairfax Publications Propriety Limited and anor v District Court (NSW) and ors*** [(2004) 148 A Crim R 522] pages 530-531

[2] Ibid, para 23

> *It is well established that the principle of open justice is one of the most fundamental aspects of the system of justice in Australia. The conduct of proceedings in public is an essential quality of an Australian Court of Justice. There is no inherent power to exclude the public.....*
>
> *It is also well established that the exceptions to the principle of open justice are few and strictly defined.*[3]

And, of course, it follows that the entitlement of the media to report on court proceedings is a natural corollary of the right of access to the court by members of the public. It encourages, hopefully, accurate reporting of proceedings.

> *From time to time the courts do make orders that some aspect or aspects of court proceedings not be the subject of publication. Any such order must ...be regarded as exceptional.*[4]

The delicate balance between the two competing, at times, principles has to be resolved at the stage at which court proceedings commenced. However, the need for significant caution and some control of media coverage of what was originally called *the Falconio case* arose much earlier.

The Background

Peter Falconio disappeared on 14 July 2001. The subsequent police investigation, and court proceedings, have involved the assumption that he was murdered that day. Whether this is so, of course, remains one of the questions for the Northern Territory jury.

There was a long delay before the identification of the alleged offender. Speculation was rife and members of the media announced their own views about the case. These obtained world-wide publicity. The alleged offender was identified in August 2002, over a year after the offence, but because of circumstances which need not be considered here, it was not until November 2003 that he was charged and extradited to the Northern Territory.

The Media Interest

The fascination of all sections of the media, both within Australia and overseas (most particularly in the United Kingdom), has been remarkable. The obvious connection of two English tourists to the alleged events at Barrow Creek has been the root of that

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[3] Ibid paras 18-19
[4] Ibid para 21

interest. Alleged murder and mayhem in the centre of the Australian continent, in a remote and lonely area, is the stuff of mystery thrillers.[5] The media surged into the area in numbers unprecedented in the Northern Territory, at least since the time of the Lindy Chamberlain case (in which there was NO British connection), which had dominated Territory legal history for twenty years.

As a result of that display of interest, it was clear to those who are involved in such areas, that from the moment Mr Murdoch arrived in Darwin the pressures on the Office of the Director of Public Prosecutions (ODPP) would be unusual. Advice was received that there would be a media pack (or scrum) at the Darwin Court of Summary Jurisdiction to greet the alleged offender's first appearance. And so it proved to be! There would be, it was suggested, a clamouring for statements from the Director of Public Prosecutions or his Office. *Kerbsides* are not generally given in the Australian criminal justice system, (certainly not by the prosecution's side).

The Mission Statement of the Northern Territory ODPP reads:-

> *The mission of the Office of the Director of Public Prosecutions is to provide the people of the Northern Territory of Australia with an independent, professional and effective criminal prosecution service that:*
>
> - *operates with integrity*
> - *is fair and just to both victims and the accused and*
> - ***is sensitive to the needs of victims, witnesses and*** *to the interests of the community on whose behalf it acts.*

Mindful of this, but also of the need to urge some self-control and discretion by the media, the Director was persuaded to issue a Media Release and to hold a *meet the media* conference outside the court. The intention was that this would be a one-off meeting (and it has been!) which would have the effect of getting the media off the prosecution's back. Thereafter, a professional media liaison officer would be employed to keep the media informed of the court's program and procedures and to remind them of suppression orders and the like.

In this connection it is necessary to understand that the Northern Territory still maintains a system of full open and public oral committals (preliminary hearings) at which the prosecution must establish there is *sufficient evidence* to put an alleged offender on his trial. These committal proceedings are often more widely publicised than the eventual

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[5] In fact, an Australian film *Wolf Creek* said to be loosely based on the case (and also on the Ivan Milat murders) was premiered at the Cannes Film Festival in May 2005. More films (docudramas) are promised!

trial itself. Evidence which is given at the committal may be accepted by the magistrate subject to and over objection. It may be ruled inadmissible at trial. Obviously enough, publicity given to it may prejudice the potential jury pool. On the other hand, the trial can often follow many months after the committal (in this particular matter, originally this was to be nine months from the committal in August 2004). It is, in the usual case hoped that this gap will enable a jury properly instructed at trial to ignore any prejudicial material emerging in the interim. This was, however, no usual case.

With all these factors present, the original Media Release dated 14 November 2003 was distributed.[6] It was written in that rather quaint *third person* style used in such documents. Part of it read:-

> *After the hearing, Mr Wild spoke to the media outside the court Mr Wild said that this was an unusual step for him to take. He did so for a number of reasons.*
>
> - *This was a significant case which had attracted a great deal of community interest and national and international media interest.*
> - *That interest had led to a great deal of speculation.*
> - *He was anxious that the genuine public interest in the case, reflected in the media interest in the case, did not adversely affect the rights of the defendant* ***and*** *the prosecution (representing the community) to a fair trial of the issues.*
> - *He hoped there would be restraint and responsibility in the reporting. He said his Office would do all it could to facilitate the media's understanding of the court processes to assist in its accurate coverage.*

That all took place on 14 November. The second appearance for the alleged offender was on 28 November. Counsel for Murdoch held his own *kerbside* in which he announced that his client was innocent and that he may not receive a fair trial. He expressed concern that his right to a *fair go* and a fair trial had potentially been severally jeopardised by press reporting.

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[6] See annexure A for the full text.

Employment of a Media Liaison Officer

Arrangements were made by the court, with the concurrence of the parties, for a split committal hearing. Three weeks were set aside in May 2004 and a further two to three weeks for August. Because it was then thought that a massive amount of material may need to be considered, one of the vacant court shells in the Supreme Court Building was designated as and designed to be an electronic court. It was fitted out accordingly prior to May 2004. The committal, unusually took place therefore in the Supreme Court itself and in the same court in which the trial will take place later this year. The jury box was, during the committal, occupied – inter- alia – by members of the media.

The Media Liaison Officer (MLO), then contracted to and employed by the ODPP, also consulted with the Stipendiary Magistrate hearing the committal. She was able to liaise on behalf of both the court and the prosecution with the media.[7]

Key elements of the arrangement between the MLO and the ODPP were in the following terms.[8]

- *a media strategy (including physical arrangements for media coverage) accreditation of media*
- *preparation of briefing materials for the media (eg explaining our court system, background on key staff)*
- *preparation of media releases for the department's website*
- *establishing policy for the Director Public Policy on issues such as electronic coverage*
- *advising media of arrangements and preparing warnings on issues such as prejudicial coverage*
- *attending court during the committal hearing and trial*
- *being available to take media queries throughout the committal hearings*
- *acting as a liaison point between the media and the Director of Public Prosecutions*
- *acting as a liaison point between the DPP and NT Police on media issues*
- *conducting media briefings in conjunction with Department of Justice and NT Police staff*
- *liaising with ministerial and departmental media and marketing staff*
- *identify any issues that may arise before or during proceedings*

[7] In the lead up to the trial, the MLO is now employed by and responsible to the court. The ODPP has had to make other arrangements and is using the Media Officer from the Department of Justice.

[8] We thank the MLO, Jane Munday, for permission to publish those in this paper. Jane has also provided a summary of the assistance to and arrangements in respect of the media by the MLO and ODPP and the problems seen, from her perspective, with the whole process (see annexure C).

After the appointment a Media Release was issued announcing the arrangements made and the identity of the MLO. It was noted that *all queries on the Falconio matter* were thereafter to be directed to the MLO.

A media strategy was then developed, the aims of which were:

- *To ensure the committal hearing and any subsequent trial are conducted without prejudicial media coverage.*
- *To acknowledge the public interest in the matter, by facilitating appropriate media access and cooperation.*
- *To ensure the Territory judicial system is portrayed as professional.*

In preparing the strategy, advice and assistance was sought from the experience of the South Australian authorities in the *Snowtown case*.[9] This identified a number of issues relating to the media. These included access to evidence, suppression orders, use of cameras and tape recorders in the court, sketch artists and background briefings.

As a result the MLO issued a document *Media Arrangements* which was distributed to the press and announced *a media briefing* for Territory media to be held in the jury room of the Supreme Court. This briefing was not for publication, was not to cover any evidence, and was simply to run through the (above) arrangements and give out applications forms for accreditation. It was held the day before the committal.

An additional briefing was held the next day for those who had just arrived. A photographic *opportunity* was arranged, with the permission of the court. This took place on Sunday morning prior to the committal commencing when the Director of Public Prosecutions was to be in court checking documents prior to the committal. It was made clear that *he (would) not give interviews*. Nor did he!

In accordance with the advice received and the strategy developed, *Fact Sheets* were issued by the MLO. These provided *background details* on the Falconio committal hearing, *media coverage of court cases* and media enquiries.

The net result of these arrangements, and those that followed during the committal hearing, was that the prosecution lawyers were able to maintain an arm's length relationship with the press. All contact with the media (apart from the casual salutations from day to day) were with the MLO.

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[9] ***R v Bunting & Ors*** *[2005] SASC 45.*

In the meantime defence counsel spoke to the press on or about 16 May 2004, when the committal was about to commence, and was quoted in these terms:

> *I am confident that Brad Murdoch has every chance of being acquitted in the fullness of time if...we can make sure he gets a fair trial, that's what I am concerned about.*

Counsel acknowledged the enormous media and public interest in a case which has captivated millions in Britain and Australia. He then made some comments on the nature of the committal procedure.

It will be noted that the prosecution at no stage spoke of the *sufficiency of evidence*, in terms of the committal standard, or the likelihood or otherwise of conviction at trial.

The MLO reminded the media at all times of suppression orders and provided timely media releases as to non-controversial matters. On 20 August 2004, following the committal of the alleged offender to the Supreme Court, it was announced that the Chief Justice would preside over the trial and that preliminary issues would be dealt with in March 2005 with a then proposed trial date of 26 April 2005.

Despite the earnest wishes of the prosecution, and presumably all parties involved in the process, there were difficulties, with enforcing appropriate suppression.

The Media knows no borders

One of the very real problems, not only in the present case, is the real internationality of media interest in sensational cases. There are thus WebPages devoted to criminal matters. There are no borders. Suppression orders made in respect of the case under discussion can only be enforced within the Northern Territory. At different times, the media were forced to edit their newspapers or television news so that suppressed material could not be distributed within the Territory. But of course, it is much more difficult to enforce such matters in respect of web providers. Nor is it possible to prevent citizens of the Northern Territory from travelling interstate (or overseas) and reading or hearing their own local news in those places.

We will deal with the difficulties that arose, in respect of suppression orders, shortly but refer you at this time to the editorial in an issue of the *Australian Law Journal* earlier this year, where it was said:-

Judge Demands Trial Web Blackout

These were the headlines of an article in The Australian of 26 January 2005 reporting on a paper delivered by Justice Virginia Bell to the conference of Supreme and Federal Court judges in Darwin.

The paper suggested that a case was made out for requiring that the internet be purged of any material likely to prejudice a trial to prevent jurors conducting their own investigations into cases in which they have been empanelled.

There have been recent instances where the result of long criminal trials has been overturned on appeal when it has come to light that jurors have judged the matter at least partly on extraneous material.

There was a particular problem with a site called CrimeNet, a national police site which published criminal histories. The operators have now taken steps to control the problems of jurors consulting this site while acting as jurors.

A problem is that material on the internet can be posted by various interested parties or pressure groups and is not in any way screened for accuracy. It is rather a farce when the accused is

protected by rules of procedure and evidence to ensure that only credible material is before the jury if the jury can see everybody's subjective thoughts and prejudices on the net.

Needless to say, persons in the internet industry said the whole idea was silly and unworkable for a number of reasons, the most persuasive being that there was no way anyone could prevent access to material posted on the net from overseas countries.

Legislation is being introduced in some States to penalise jurors who conduct their own investigations on the internet. It is doubtful though whether this is sufficient to stop the practice.[10]

Suppression Orders – Section 58 *Evidence Act*

In the week prior to the committal proceedings State Square, outside of the Supreme Court in Darwin, was invaded by satellite dishes, makeshift media tents and cameramen vying for the perfect Darwin backdrop for their nightly news reports. In anticipation of Joanne Lees' arrival for a conference, the media had also staked out the ODPP for much of the weekend. Day one

[10] (2005) 79 ALJ 200

saw the frenzy continue. His Worship, Mr McGregor, permitted the media to film inside the court room whilst he made some brief opening remarks. The court room was a buzz with the flurry of pens and the flash of cameras.

Given the unprecedented media attention, at the outset of the committal proceedings, the Director – at the Defence's request - made an application to suppress those parts of the Crown Opening that the Defence had indicated there would be *genuine challenge* to at trial. For the most part this would have little effect on the majority of the media – those from overseas - as any suppression order would operate only within the jurisdiction of the Northern Territory. So long as articles containing suppressed material did not find their way onto the internet they would not require editing.

Not so for the Australian media. Sensing – as is their job - something like this might occur, its representatives came armed with Counsel to ensure their interests were represented. Mr Reeves QC was the first to appear on behalf of the Nine Network and later Michael Grant appeared on behalf of - the *other Murdoch* - Nationwide News. Mr Reeves indicated that he was not instructed to oppose the application on an interim basis but he wished to be heard when the matter was to be argued fully. The prosecution opened its case and the Magistrate ordered suppression of certain material pursuant to s. 58 ***Evidence Act.***[11] So there was no confusion as to what could be reported, a document setting out what was suppressed was provided to the media. Mr Reeves indicated that he wished to adjourn full argument of the matter until the following morning.

As has been mentioned, a new Court was constructed prior to the committal proceedings. The modest size of the court room meant that the bar table was spread out over two rows. As one might expect the front table was occupied by those Counsel representing parties in the proceedings; the Crown and the Defence. Junior Defence Counsel, Mr Read, was less than impressed to arrive on day two to find that he had been relegated to the second row by media representatives. The Court has a discretion to grant media representatives leave to appear and there are numerous authorities which recognize the standing of the media to challenge suppression orders.[12] It was not contended that either of these parties should not have been granted leave to appear before the Magistrate, however, self-elevation to pole position at the bar table conveyed a clear message that they considered their interests ranked above the accused's.

Despite impressive arguments by both Mr Reeves QC and Mr Grant, the suppression orders remained in place. The relief was short lived. Later that evening the prosecution and defence were advised the Nine Network intended to review the order of the Magistrate. A motion seeking certain declaratory relief was filed the following morning and the matter was referred directly to the Full Court pursuant to s. 21 of the ***Supreme Court Act.*** This was to avoid the delays which would follow a decision by a single judge which would inevitably be the subject of appeal.

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[11] See annexure B (ss. 57 and 58 of the ***Evidence Act (NT)***)

[12] ***Herald and Weekly Times v Braun*** [1994] 1 VR 705; ***Herald and Weekly Times v Woodward*** [1995] 1 VR 156; ***Nationwide News v District Court*** (1996) 40 NSWLR 486

It was contended that the extent of the Magistrate's power, in exercising a statutory function, was circumscribed by statute and certain implied powers[13] and s. 58 conferred a narrow power on the Court to suppress evidence for the limited purpose of non-contamination of witnesses in the proceedings before it. In particular, it did not extend to prevent the contamination of jurors at later trial proceedings. Further, that the words *evidence given or used* were not prospective and, therefore, did not include a summary of the evidence *to be given*, such as an opening.

As delegates at this conference well know, it is rare for prosecution and defence to be in agreement. However, before the Full Court there was a unified voice. Both substantive defendants[14] argued that the section conferred a broad discretionary power to suppress evidence in the interests of the administration of justice and that the plaintiff's interpretation fettered that discretion. Further, that the section should be read to include *evidence to be given.*

The court stated that s. 58 was an express derogation from the fundamental principle of open justice to ensure accused persons receive a fair trial and that the suppression of portions of the Crown Opening was a valid exercise of that power. A narrow construction of the word 'evidence', limited to oral testimony, did not promote the purpose of the Act which is to provide a power to make a suppression order "where it is necessary for the furtherance or otherwise in the interests of the administration of justice."[15] Courts have commented that these words should not be confined. As King CJ stated in ***G v The Queen,***

> *The width of the expression requires no emphasis. It comprehends every aspect of the administration of justice and is obviously intended to confer on the courts the widest of discretions.*[16]

The Court did not consider that the provision should be limited to the proceedings before it – the committal proceedings – and that a proper exercise of the power included the making of an order to prevent contamination of witnesses at a future trial.

To put the decision in context, had the suppression orders been lifted, the likely result would have been the end of any further evidence in the committal proceedings. But for a brief appearance by counsel – in the second row – the committal proceeded without further interruption by the media and fragmentation of the proceedings.

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[13] See ***Grassby v The Queen*** (1989) 168 CLR 1 at 16

[14] The first defendant was the magistrate who abided the decision of the court and did not present argument. The second defendant was the informant represented by the ODPP on the appeal. The third defendant was Bradley Murdoch. He was represented by Colin McDonald QC, separately briefed on these issues.

[15] ***Nine Network Pty Ltd v Mcgregor & Ors*** [2004] NTSC 27, para 32-4

[16] (1984) 35 SASR 349 at 351

Argument before the Magistrate having delayed any evidence being heard in the committal proceedings, the effect of the appeal brought the committal proceedings to a complete standstill. The stress on witnesses waiting to give evidence, and the effect on the Crown's not bottomless pocket, was significant.

The decision to appeal the Magistrate's order was not supported by all media. The order had little impact on those international members of the press and the delay meant that they now had nothing to report. It was clear that many of the local media were similarly not concerned with the suppression orders. Most of the television stations had local and interstate journalists and ran two stories or, in the example of Channel 7, blocked out all reporting of the case in the Northern Territory. Channel 9, however, apparently wanted to run a story on *A Current Affair* and, as the show ran nationally, were prevented from doing so whilst the suppression orders were in place.

The appeal to the Full Court

The thrust of the Nine Network's submission was premised on the following principles:

- The administration of justice should take place in open court and nothing should be done to discourage the making of fair and accurate reporting of court proceedings.

- In an era of instant global news broadcasts members of the public – potential jurors amongst them – were likely to gain some, if not detailed, knowledge of the case by the time it came to trial and courts should rely on the integrity of jurors to decide the case on the evidence before them.

- Curtailing the flow of information through suppression orders was dangerous as it encouraged speculation and gossip.

- Suppression orders were limited as they did not prevent a potential juror from attending the proceedings and hearing the evidence themselves and, as they were limited to the jurisdiction of the Northern Territory, did not safeguard against the reading of the material in another jurisdiction.

- The court should assume that journalists reporting the proceedings will act competently, professionally and responsibly.

The last submission is one frequently cited on behalf of media organizations. Interestingly, a few days earlier – the day after the suppression order had been made - *The Australian* published an article on the internet in breach of the suppression order – the point being, no matter how responsible and professional the media are, they make mistakes!

Cheque-book journalism[17]

Another issue, not unique to the Murdoch prosecution, is the attempt by media to buy exclusive stories from witnesses. In the weeks leading up to the commencement of the committal a number of faxes arrived at the ODPP offering substantial amounts of money to Joanne Lees in exchange for an exclusive interview. A few weeks earlier a trial in NSW had been aborted – just prior to the jury deliberations – following the complainant in an assault case being offered monies for her story. When the prosecution in that case became aware of the fact it was disclosed to the defence and the trial aborted. His Honour, Judge Marien, made these comments.

> *...the serious problem that such an offer raises is that on the occasion when an honest and truthful complainant comes before the court to whom such an offer is being made, their credit may be so impugned as to prevent a conviction, when a conviction should occur in the interests of justice...*
>
> *Media organizations should refrain from making any such offer until trial proceedings have concluded and indeed it will be preferable until appellate proceedings have concluded because appellate proceedings can lead to an order for a re-trial.*[18]

The Bali Accused

The last year has seen extraordinary media interest in the arrests of a number of Australians for drug trafficking in Indonesia. The media in these instances have been focused on getting an inside scoop from the accused persons and members of their families. The danger of this form of cheque-book journalism has the potential to cost these individuals their lives. Shortly after their arrest of the *Bali Nine*, Channel 9's *A Current Affair* set up an exclusive interview between the parents of Michael Czugaj, one of those arrested. A producer for the show, Chris Allen, accompanied the parents to Bali and arranged for the interview to take place whilst their son made a visit to the dentist. The parents were wired with microphones and questioned their son about how he came to be involved. His, not surprisingly, inadequate responses were then broadcast nationally. Back in the studio, Michael Czugaj's sister, Melanie, was being interviewed about conversations she'd had with her brother moments before *a group of Asians* came to pick him up. Channel 9, although denying exclusivity appeared to represent the family when other media representatives sought to interview them and were later seen taking provisions into the gaol.[19] It is not necessary to be a criminal lawyer to understand the implications that this sort of irresponsible journalism might have on the outcome of the proceedings in Indonesia and, ultimately, whether a young man lives or dies.

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[17] The Australian Press Council is currently considering the implementation of practices for the disclosure of payments in publications and guidelines in relation to the payment of witnesses where matters are before the court.

[18] Decision of Judge Marien, District Court of NSW 16/03/04 ***R v JMS***

[19] ABC, Media Watch 2/5/05

Similarly, the media have made Schapelle Corby – ***Our Schapelle*** - a household name. The broadcast of *Schapelle's Nightmare: The Untold Story* which involved members of the audience giving their verdict at the conclusion of Channel 9's version of the evidence is yet another recent and significant example of irresponsible journalism. One can only speculate as to what impact this sort of sensationalism has on the outcome of proceedings.

The question is why does a media outlet wish to become involved in proceedings, other than for financial gain, where their involvement may well influence the ultimate outcome. If it were known that the media had influenced the acquittal of a guilty person or the conviction of an innocent person surely, the public would be outraged – but would the public ever know?

Reform?

Since the Full Court's decision, similar challenges have been made to lift suppression orders made within the course of criminal proceedings. You may recall cryptic headlines about *A prominent Territorian* or the *Humpty Doo pig-shooter.* A question arises: Do the current provisions provide sufficient scope for Magistrates to ensure a fair trial for both the accused and the prosecution? Sections 57 and 58 of the ***Evidence Act*** replicate the original ss. 69 and 79 of the ***Evidence Act*** (1929) *SA.* Those provisions have now been replaced by a much broader s. 69A of the ***Evidence Act (SA)***[20] which is not limited in its application to *evidence* and does not require an order to be made for witnesses out of court before jurisdiction is invoked. It allows for suppression orders to be made to prevent prejudice to the proper administration of justice or to prevent undue hardship to an alleged victim, a witness or a child. In making a determination under this provision, the Court is required to give *substantial weight* to the *public interest in publication of information related to court proceedings.*

These provisions were closely examined in the *Snowtown* case,[21] in which there were 257 suppression orders made. Since that decision a South Australian Legislative Committee conducted a review of s. 69A to determine the effect of publication of accused persons names on them and their families. The Inquiry received submissions from the Law Society, many media representatives and representatives of the public and the Chief Justice of South Australia. The Report[22] recommended more sweeping changes to the legislation to take into account the impact on publication of allegations on the an accused's family and that information that would identify an accused be suppressed until the accused is acquitted or has exhausted all rights of appeal.

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[20] See attached

[21] ***Adelaide Advertiser v Bunting & Ors*** [2000] SASC 458

[22] *Report of the Legeslative Review Committee: s. 69A of the* **Evidence Act** *1929 'Suppression Orders'* 6 April 2005

The Internet

If the media knows no border, the Internet is truly international. This topic was the subject of the paper presented by Justice Bell earlier this year.[23] Her Honour referred to the problem identified by the proprietors of the website CrimeNet. It now requires that a person searching its criminal records database open an account. The subscriber must agree *not to search for details of any person whilst I am a juror in a trial of that person, in a jurisdiction that prohibits such information.*[24]

In the *Murdoch* case, the Chief Justice (who is to preside over the trial and has conducted all the preliminary conferences and voir dire hearings) has requested the prosecution to:

- maintain a watchful eye on the internet for potentially prejudicial offerings.

- suggest the internet providers to use discretion in publishing material about the case.

Although the ODPP has complied with these requests (directions?), it is a task very much akin to ***herding cats!***

Rex Wild QC
ODPP Chambers
Darwin, Northern Territory Australia
July 2005

[23] See footnote 10 above.
[24] www.crimenet.com.au

ANNEXURE A

OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS
NORTHERN TERRITORY

MEDIA RELEASE

Prosecution of Bradley John Murdoch

FIRST COURT APPEARANCE FOR BRADLEY JOHN MURDOCH

Date: 14 November 2003

Bradley John Murdoch was presented in the Court of summary Jurisdiction at Darwin today, charged with the following offences:

1. *On the 14th day of July 2001 at or near Barrow Creek in the Northern Territory of Australia did murder Peter Marco FALCONIO.*
   Contrary to Section 162 of the Criminal Code.

2. *On the 14th day of July 2001 at or near Barrow Creek in the Northern Territory of Australia deprived Joanne Rachael LEES of her personal liberty:*
   Contrary to Section 196 (1) of the Criminal Code.

3. *On the 14th day of July 2001 at or near Barrow Creek in the Northern Territory of Australia unlawfully assaulted Joanne Rachael LEES:*

   AND THAT the said unlawful assault involved the following circumstances of aggravation, namely:

   (i) *That the said Joanne Rachael LEES suffered bodily harm.*
   (ii) *That the said Joanne Rachael LEES was a female and the said Bradley John MURDOCH was a male*
   (iii) *That the said Joanne Rachael LEES was threatened with a firearm.*
   Contrary to Section 188 (2) of the Criminal Code.

Northern Territory Director of Public Prosecutions, Rex Wild QC, appeared in court today before the Chief Stipendiary magistrate, Mr Hugh Bradley, when Mr Murdoch was brought before the court on the arrest warrant which was used for his extradition from South Australia to the Northern Territory.

After the hearing, Mr Wild spoke to the media outside the court.

Levels 1 & 2 Tourism House, 43 Mitchell Street, Darwin NT 0800
GPO Box 3321, Darwin NT 0801
Media enquiries: Telephone: 0011 61 1800 041 005 Fax: (08) 8999 5183
http://www.nt.gov.au/justice/dpp/media_releases falconiocase@nt.gov.au

Mr Wild said that this was an unusual step for him to take. He did so for a number of reasons.

- This was a significant case which had attracted a great deal of community interest and national and international media interest.
- That interest had led to a great deal of speculation.
- He was anxious that the genuine public interest in the case, reflected in the media interest in the case, did not adversely affect the rights of the defendant *and* the prosecution (representing the community) to a fair trial of the issues.
- He hoped there would be restraint and responsibility in the reporting. He said his Office would do all it could to facilitate the media's understanding of the court processes to assist in its accurate coverage.

I have received the brief from the Northern Territory Police, together with all of the other documents generated by their extensive investigation. Mr Wild told the media *those papers are voluminous, running to approximately 300 lever arch files. There are so many that we have needed two compactuses to store them. I intend to provide the defence not merely with those documents which we say are central to the case against Mr Murdoch, but to provide a copy of the whole of the police investigation papers so that the defence are not hampered in any way.*

Mr Wild said it was intended for the investigation papers be scanned and catalogued so that they could be provided to the defence and the court in electronic format, much the same as had been done in cases like the HIH Royal Commission, the Bodies in the Barrel Case and the Longford Gas Enquiry.

We are told that because of the volume of documents involved, the scanning and the cataloguing will take about eight weeks to complete. Then that will have to be checked by my prosecution team. It is only then that the full brief can be delivered to defence counsel. In the meantime, I will be providing to the defence a paper copy of witness statements upon which the prosecution will principally rely in the case against Mr Murdoch.

Mr Wild said that the prosecution had already done a deal of work in anticipation of the matter coming to the Northern Territory. He would be leading the prosecution team and would be assisted by Mr Anthony Elliott one of his Senior Crown Prosecutors. He and Mr Elliott had visited Barrow Creek with police in January this year and viewed exhibits.

The precise course which this case will now follow depends, in part, on the court and the defence lawyers. We expect that the defence will need some time to digest the

papers and decide what their approach should be. We expect the committal to take quite a number of weeks to conclude. It is not yet clear how soon the court, the defence and my Office can be ready for a committal. We will be doing our utmost to be ready as soon as humanly possible. But the task facing us, the defence and the court is a huge one.

Once the committal is over, assuming that Mr Murdoch is committed for trial, his Office will prepare the case for that trial in the Supreme Court. Generally speaking, trial dates cannot be obtained in less than six months from committal.

Mr Wild reminded the media that the presumption of innocence applied to Mr Murdoch, as it did to all persons charged before the courts. That is, he was presumed innocent until a jury found him guilty beyond reasonable doubt. He again urged restraint in their reporting and in their, and the community's, speculation about the matter.

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Endeavours will be made to inform the media of significant steps in the proceedings. This will be done by sending out media advisories by e-mail and by posting media releases on a special page on the Office of the Director of Public Prosecutions' website. Additionally, those whose e-mail details are in our database will be sent a copy of any media releases by e-mail.

For those who have already received a copy of this morning's media advisory, your e-mail details have been noted. Anyone who wishes to have their details added to our database should send them to falconiocase@nt.gov.au.

PART VII – PUBLICATION OF EVIDENCE

57. Prohibition of the publication of evidence and of names of parties and witnesses

(1) Where it appears to any Court –

(a) that the publication of any evidence given or used or intended to be given or used, in any proceeding before the Court, is likely to offend against public decency; or

(b) that, for the furtherance of, or otherwise in the interests of, the administration of justice, it is desirable to prohibit the publication of the name of any party or intended party to, or witness or intended witness in, such proceeding,

the Court may, either before or during the course of the proceeding or thereafter, make an order –

(i) directing that the persons specified (by name or otherwise) by the Court, or that all persons, except the persons so specified, shall absent themselves from the place wherein the Court is being held while the evidence is being given;

(ii) forbidding the publication of the evidence, or any specified part thereof, or of any report or account of the evidence, or any specified part thereof, either absolutely or subject to such conditions, or in such terms or form, or in such manner, or to such extent, as the Court approves; or

(iii) forbidding the publication of the name of any such party or witness.

(2) Where the Court makes an order under subsection (1)(iii), the publication of any reference or allusion to any party or witness, the name of whom is by the order forbidden to be published, shall, if the reference or allusion is, in the opinion of the Court hearing the complaint for the alleged offence, intended or is sufficient to disclose the identity of the party or witness, be deemed to be a publication of the name of the party or witness.

(3) When the Court makes an order under subsection (1)(ii) or (iii), forbidding the publication of any evidence or any report or account of any evidence, or the publication of any name, the Court shall report the fact to the Director of Public Prosecutions, and shall embody in its report a statement of –

(a) the evidence or name, as the case may be, by the order forbidden to be published; and

(b) the circumstances in which the order was made.

58. Temporary prohibition of the publication of evidence where witnesses ordered out of Court

Where, in the course of any proceeding before any Court, witnesses are ordered out of Court, and it appears to the Court that, for the furtherance or otherwise in the interests of the administration of justice, it is desirable to prohibit for any period the publication of any evidence given or used in the proceeding, the Court may make an order forbidding, for such period as the Court thinks fit, the publication of the evidence or any specified part thereof.

ANNEXURE C

SUMMARY OF ARRANGEMENTS IN RESPECT OF MEDIA FOR MURDOCH COMMITTAL MAY AND AUGUST 2004

- a media room was established in the court, with extra phone connections for journalists to file their stories.
- media were able to film the start of proceedings, before the defendant came into Court – this was to help satisfy their need for pictures and the Magistrate used the opportunity to remind media of the need for care.
- closed circuit television coverage was broadcast to an adjoining courtroom, to accommodate the public, the jury room and media room.
- the MLO helped streamline access to transcripts.
- a form was prepared to help media apply for access to photos tendered in court.
- by arrangement with other government departments, parking spots, room for their buses and live cross vans, were made available to the media.
- vacant space in a nearby government building was made available for offices.
- media and the court artist were allowed to occupy the jury box and given allocated seats in the courtroom.
- media were accredited and added to an email grouping so they could be advised of developments.
- the MLO acted as go-between when media wanted to talk to family and witnesses.
- the MLO collated press clippings of all local and national clippings, which were circulated to the Prosecution, Defence and the Court.
- immediate action was taken whenever inaccurate or prejudicial articles appeared.
- regular Internet searches were conducted and many prejudicial articles were removed voluntarily from a number of media sites once the suppression orders were brought to the attention of the sites' owners.
- ODPP alerted newsrooms to the impending trial to ensure they were aware of the suppression orders.+

ANNEXURE C

[It should be noted that the overseas press, despite some anticipatory concerns, were exceedingly cooperative, ensuring that the stories appearing in their printed papers did not appear on the Internet.]

Problems Identified

- several members of the media do not understand the law of contempt and some were prepared to push the boundaries – highlights a training issue.

- slip-ups by radio stations relaying news from interstate which contained suppressed material.

- Occasional slip-ups by newspapers circulating prejudicial material in the Territory – and problems faced by newsagents in a town like Darwin when most of the interstate papers dried up at times because it was easier not to publish in the Territory than print two editions.

- occasional slip-ups with prejudicial material appearing on the Internet – in the digital world – a growing fact of life in this digital world.

- chat rooms on the Internet containing prejudicial material – it is impossible to do much about some of these.

- a particularly provocative anarchists' site was ignored, rather than providing free publicity in taking action.

- Trivial Pursuit board game circulating in the Territory with a question relating to suppressed evidence.

- it came to light that even when media ensured items weren't published on their web sites, the same items were freely available through digital subscription services on the same sites (this anomaly was brought to the attention of two main newspaper publishers and corrective action taken).